



In the Matter of:

MARK DUNCAN,

ARB CASE NO. 99-011

COMPLAINANT

ALJ CASE NO. 97-CAA-12

v.

DATE: September 1, 1999

**SACRAMENTO METROPOLITAN
AIR QUALITY MANAGEMENT
DISTRICT,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mark Duncan, *pro se*
Shingle Springs, California

For the Respondent:

Kenneth Swenson, Esq., *Duncan, Ball, Evans & Ubaldi*
Sacramento, California

For the Amicus Curiae, Assistant Secretary, Occupational Safety and Health:

Steven J. Mandel, Esq., William J. Stone, Esq., *U.S. Department of Labor*
Washington, D.C.

**ORDER ACCEPTING APPEAL
AND ESTABLISHING BRIEFING SCHEDULE**

On December 3, 1998, we issued an Order to Show Cause in this case arising under the employee protection provision of the Clean Air Act, 42 U.S.C. §7622. In our order, we noted that Complainant Mark Duncan had not filed a petition for review of the Administrative Law Judge's October 16, 1998 Recommended Decision and Order in this matter with the Administrative Review

Board within 10 days as provided in 29 C.F.R. § 24.8,^{1/} but instead had filed the petition with the Labor Department's Chief Administrative Law Judge.^{2/} Complainant Duncan and the Assistant Secretary of Labor, Occupational Safety and Health have urged the Board to accept the petition for review and to consider the case on the merits. They argue that the 10-day filing period is not jurisdictional and Duncan's timely filing with the Chief Administrative Law Judge tolled the filing deadline. The Respondent, Sacramento Metropolitan Air Quality Management District (SMAQMD), contends that the 10-day period is jurisdictional and in any event that we should not waive it in this case.

The question whether 29 C.F.R. §24.8's 10-day period for filing an appeal is jurisdictional is an issue of first impression. However, the Board has recognized in interpreting analogous filing provisions that compliance with such filing periods is not a jurisdictional prerequisite to obtaining review, but such filing provisions are instead procedural in nature, comparable to a statute of limitations, which may be tolled for equitable reasons. *See, e.g., Degostin v. Bartlett Nuclear, Inc.*, 98-ERA-7 (ARB May 4, 1998); *Staskelunas v. Northeast Utilities Co.*, 98-ERA-8, (ARB May 4, 1998); *Backen v. Entergy Operations*, 95-ERA-46 (ARB June 7, 1996). This interpretation is fully consistent with Supreme Court and Federal Appellate Court precedent holding that an administrative agency may waive procedural requirements in the interest of justice, provided that such a waiver will not prejudice the other party. *See e.g., American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322 (9th Cir. 1987); *Amcor, Inc. v. Brock*, 780 F.2d 897 (11th Cir. 1986). *Accord Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

In *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), the Supreme Court discussed the purpose of statutes of limitations:

Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

^{1/} 29 C.F.R. §24.8 provides that a party seeking review of an ALJ's recommended decision and order shall file a petition for review with the Administrative Review Board. To be effective, the Board must receive the petition within 10 business days of the date of the recommended decision. 29 C.F.R. §24.7(d) provides that the recommended decision shall become the Secretary's final order unless, pursuant to 29 C.F.R. §24.8, a party timely files a petition for review with the Board.

^{2/} The ALJ's recommended decision and order is dated October 16, 1998. The Chief Judge of the Office of Administrative Law Judges received the petition for review on October 30, 1998. The Office of Administrative Law Judges issued a notice of improper filing, informing Duncan of his error on November 10, 1998. Duncan filed his petition for review with the Board on November 23, 1998.

(Citation omitted). In this case, Duncan put the SMAQMD on notice that he intended to file a petition for review with the ARB within the 10-day period provided in 29 C.F.R. §24.8 when he erroneously filed his petition with the Chief Administrative Law Judge. Furthermore, when the Chief Administrative Law Judge notified Duncan of his error, he refiled the petition with the ARB within 10 days of the notification. The SMAQMD has failed to demonstrate that it was prejudiced by Duncan's error. This case involves neither a stale claim, nor a petitioner who has "slept on his rights." Accordingly, we **ACCEPT** Duncan's petition for review and establish the following briefing schedule.

Complainant may file an initial brief, not to exceed thirty (30) double-spaced typed pages, on or before **October 1, 1999**. Respondent may file a reply brief, not to exceed thirty (30) double-spaced typed pages, on or before **November 1, 1999**. Complainant may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed ten (10) double-spaced typed pages, on or before **November 15, 1999**.

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. See, e.g., Fed. R. Civ. P. 7(b).

All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1¼ inch top and bottom margins, printed on 8½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted.

An original and four copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C., 20210.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member